Mirra Sdn Bhd v The Ayer Molek Rubber Company Bhd

COURT OF APPEAL (PUTRAJAYA — CIVIL APPEAL NO W-02–367 OF 2007
JAMES FOONG, ABDULL HAMID EMBONG ANDVINCENT NG JJCA
12 DECEMBER 2007

Civil Procedure — Judgment — Setting aside — Judgment in default — Whether there was delay in making such application — Whether within reasonable time — Fresh steps taken by plaintiff before application

Civil Procedure — Judgment — Setting aside — Judgment in default — Pre-judgment interest — Whether court could award pre-judgment interest in a judgment in default — Civil Law Act 1956 s 11

Civil Procedure — Judgment — Setting aside — Judgment in default — Limitation — Last payment within six years — Whether action barred by limitation — Limitation Act 1953 s 26(2)

Civil Procedure — Judgment — Setting aside — Judgment in default — Accord and satisfaction — Failure to fulfill substituted obligation — Whether there was a release of original obligation

The appellant entered a judgment in default of appearance against the respondent on 22 November 2005. A notice under s 218 of the Companies Act 1965 was served on the respondent when the respondent failed to satisfy the judgment sum. The appellant thereafter presented a winding up petition against the respondent. Subsequently, the respondent filed an application on 23 March 2006 to set aside the appellant's judgment in default, alleging that: (i) there was a settlement agreement between the parties; (ii) the appellant's claim was time barred; and (iii) the appellant was not entitled to pre-judgment interest without the sum being assessed. The High Court allowed the respondent's application. The appellant appealed to the Court of Appeal.

Held, allowing the appeal:

(1) When the respondent had failed to act '(a) with reasonable

promptitude, in other words within a reasonable time; and (b) before the plaintiff has taken any fresh step after becoming aware of the irregularity', then the court should not come to his aid in setting aside the default judgment (see para 7).

(2) Pre-trial interest is allowed by law to be claimed by the appellant. This is specified in s 11 of the Civil Law Act 1956 as well as in judicial pronouncements. Though the word 'tried' is used in s 11 of the Civil Law Act 1956, it should be given a broad interpretation to include any order made by the court, be it judicially made or done administratively (see para 12).

(3) No injustice was done to the respondent in awarding such interest without assessment since the respondent had been accorded full opportunity to contest this by entering an appearance or a defence. Obviously, by not doing so, the respondent must be deemed to have opted not to challenge any part of the claim which included the part on pre-judgment interest (see para 12).

(4) Since the appellant's action was brought well within the six year period from the date of the last payment, the respondent's claim of limitation could not succeed even if the matter were to go on trial (see para 19).

(5) As the respondent had failed to fulfill the substituted obligation to pay on the conditions as stipulated in the agreement between the parties, the appellant had every right to institute this action against the respondent (see para 23).

[Bahasa Malaysia summary

Perayu memasukkan penghakiman ingkar terhadap ketidakhadiran responden pada 22 November 2005. Satu notis di bawah s 218 Akta Syarikat 1965 telah disampaikan kepada responden setelah responden gagal membayar jumlah penghakiman. Perayu kemudiannya menyerahkan petisyen penggulungan terhadap responden. Berikutnya, responden telah memfailkan permohonan pada 23 Mac 2006 untuk mengetepikan penghakiman ingkar perayu, dengan mengatakan: (i) telah ada persetujuan penyelesaian di antara kedua pihak; (ii) tuntutan perayu telah tamat tempoh; dan (iii) perayu tidak berhak ke atas faedah penghakiman awal tanpa taksiran dibuat. Mahkamah Tinggi membenarkan permohonan responden. Perayu merayu di Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Apabila responden gagal untuk bertindak '(a) dengan kesegeraan munasabah, dengan kata lain dalam tempoh yang munasabah; dan (b)

sebelum plaintif mengambil langkah baru setelah menyedari ia di luar aturan', maka mahkamah tidak sepatutnya memihak kepada beliau dalam mengetepikan penghakiman ingkar (lihat perenggan 7).

(2) Faedah pra-perbicaraan adalah dibenarkan dalam undang-undang kepada perayu. Ini ada dijelaskan dalam s 11 Akta Undang-Undang Sivil 1956 dan juga sebutan kehakiman. Walaupun perkataan 'cuba' digunakan dalam s 11 Akta Undang-Undang Sivil 1956, ia sepatutnya diberikan makna yang meluas yag merangkumi semua arahan yang diguna pakai oleh mahkamah, sama ada dibuat dalam proses kehakiman atau dalam proses pentadbiran (lihat perenggan 12).

(3) Tiada ketidakadilan dilakukan terhadap responden dalam memberikan faedah tanpa taksiran kerana responden telah diberi peluang untuk melawan dengan hadir untuk perbicaraan atau pembelaan. Dalah jelas, dengan memilih untuk tidak berbuat demikian, responden telah dianggap telah memilih untuk tidak membantah mana-mana bahagian dalam tuntutan termasuk tuntutan faedah pra-penghakiman (lihat perenggan 12).

(4) Memandangkan tuntutan perayu dilakukan dalam tempoh enam tahun dari tarikh bayaran terakhir, tuntutan had masa responden tidak boleh berjaya walaupun jika perkara tersebut dibicarakan (lihat perenggan 19).

(5) Memandangkan responden telah gagal untuk menyempurnakan tanggungjawab gantian untuk membuat bayaran berdasarkan syarat yang dittapkan dalam perjanjian antara kedua-dua belah pihak, maka perayu mempunyai segala hak untuk mengambil tindakan demikian terhadap responden lihat perenggan 23).]

Notes

For cases on setting aside of judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3943–4008.

Cases referred to

Evans v Bartlam [1937] AC 473 (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)

Lee Guan Par v Hotel Universal Sdn Bhd [2005] 4 MLJ 589 (refd)

Lee Kuan Yew v Scow Khee Leng [1986] 1 MLJ xi (refd)

Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd [1965] 1 QB 300 (refd)

Solid Kitchen Sdn Bhd v Aman Teguh-WlCC JV Sdn Bhd & Anor [2003] 5 MLJ 412 (refd)

Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd [2003] 4 MLJ 30 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Civil Law Act 1956 s 11
Limitation Act 1953 ss 6(1)(a), 26(2)
Rules of the High Court 1980 O 42 r 13

Appeal from: Civil Suit No S1–22–1178 of 2005 (High Court, Kuala Lumpur)

B Thangaraj (Thangaraj & Associates) for the appellant.
K Mohan (Sudesh Singh with him) (Shook Lin & Bok) for the respondent.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, as plaintiff, has sued the respondent on 10 October 2005 in the High Court for a sum of RM2,097,315.62 with interest thereon at 8% per annum from 24 March 1999 and costs. The writ of summons was served on the respondent on 27 October 2005 and when no appearance was filed by the respondent within the prescribed time, judgment in default of appearance was entered against the respondent on 22 November 2005. When the respondent failed to satisfy the judgment sum, despite being served with a sealed copy of the judgment order on 30 November 2005, the appellant issued a notice under s 218 of the Companies Act to the respondent. Still receiving no reaction from the respondent, the appellant presented a winding up petition against the respondent in the bankruptcy court. This time, the respondent responded by filing an application on 23 March 2006 to strike out the appellant's judgment in default. This was some two months 24 days after the period of 30 after the receipt of the judgment order.

[2] Three grounds were listed by the respondent in support of its application to set aside the judgment in default of appearance:

(1) There was a settlement agreement between the parties where the appellant had agreed to accept a sum of RM300,000 as full settlement of the appellant's claim.

(2) The appellant's claim is time barred.

(3) The appellant is not entitled to pre-judgment interest without the sum being assessed.

[3] The respondent's application was heard by the senior assistant registrar ('SAR') of the High Court who allowed the application. On appeal to judge in chambers, the decision of the SAR was affirmed.

[4] In affirming the decision of the SAR, the learned High Court judge first ruled that the delay of '2 months and 24 days (in making the application) is not unduly long considering that the cause of action arose from nearly six years earlier in mid 1999 and legal action therefore was only filed on 10 October 2005'.

[5] Then he proceeded to say:

> The consideration in an application to set aside a default judgment is unlike that in an application for judgment under the summary jurisdiction under O 14 of the Rules of the High Court 1980. Given the long delay before filing the action, the entry of judgment in default under the summary jurisdiction is unsafe to be maintained, particularly in light of the fact the defendant has submitted itself to the jurisdiction of the court so that a decision on the merits may be made. There is no injustice caused upon the plaintiff for the reason that if the merits are not with the plaintiff, the judgment in default should not be maintained upon a technicality, and if the merits are with the plaintiff, all that the plaintiff suffers is a delay which can be compensated with an order for interest and costs.

PRINCIPLES OF LAW TO BE APPLIED

[6] Before I touch on the initial issue of delay in filing the application to set aside the default judgment, I shall first consider whether the learned High Court judge has erred in applying the right legal principle when considering a matter of this nature. Regrettably, it is my humble opinion that he failed to appreciate the correct test to apply. The said judge should, when considering such application, first identify whether the judgment in default is a regular or irregular judgment. It is well settled that if the judgment is irregular then the respondent is entitled to have the judgment set aside *ex debitio justitiae*. If it is regularly obtained, then the principle expounded in *Evans v Bartlam* [1937] AC 473, as confirmed by the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, applies. And in either situation, delay is a factor to be considered — see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. Here the learned judge first took the appellant to task for the delay in filing the suit against the respondent. This certainly is not a factor to be considered in an application to set aside a judgment in default unless when considering whether there is merit in the defence if the judgment is regularly obtained. And even this is only in respect of whether the claim was brought within the limitation period. The learned judge also considered no injustice caused to the appellant when the merit of the case has yet to be determined. This again

is an incorrect approach when the issue of injustice is to be decided by applying established legal tests rather than one concocted by the trial judge himself. As the learned judge had applied the wrong principles of law and asked the wrong questions, on this ground alone, this appeal should be allowed.

DELAYED APPLICATION

[7] Nonetheless, I shall venture to add that the respondent was also guilty of delay in applying to set aside the default judgment. Under O 42 r 13 of the Rules of the High Court 1980 ('the RHC'), the respondent is required to apply to set aside the default judgment within 30 days from the date of receipt of the judgment order. This, the respondent failed to do within the prescribed time. And by the time when this application was made, the appellant had taken a fresh step in filing a petition to wind up the respondent. When the respondent had failed to act '(a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity (see O 2 r 2(i) of the Rules of the High Court 1980' — per Edgar Joseph Jr FCJ in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* then the court should not come to his aid in setting aside the default judgment.

PRESUMING THE RESPONDENT HAD COMPLIED WITH O 42 r 13 OF THE RHC AND THE LEARNED JUDGE HAD APPLIED THE CORRECT PRINCIPLES

[8] Even assuming that the learned judge had applied the correct principles of law and the application to set aside was made by the respondent within the prescribed time, it is my view that the application based on the facts as adduced ought to be refused for the following reasons:

IS THE JUDGMENT AN IRREGULAR JUDGMENT FOR REASON THAT PRE-JUDGMENT INTEREST WAS NOT ASSESSED?

[9] First, on whether the judgment is an irregular judgment, the respondent has argued that the default judgment carries a pre-judgment interest of 8% per annum on the judgment sum from 24 March 1999, a period that is more than six years before the filing of the Writ, without this claim being first assessed This, the respondent argued is in contravention of s 11 of the Civil Law Act 1956, thus rendering it an irregular judgment which ought to be set aside *ex debito justitiae*.

[10] Section 11 of the Civil Law Act 1956 provides:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section —
>
> (a) shall authorize the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

[11] According to the respondent, the word 'tried' connotes a hearing having taken place before the court rather than an administrative act performed by the court in entering judgment in default of appearance. As the pre-judgment interest claim was not assessed by the court, then s 11 of the Civil Law Act has not been complied with. This makes the default judgment a nullity and ought to be set aside for irregularity. For support, learned counsel for the respondent cited to us the following commentary in the 1979 English Supreme Court Practice 1979 (*White Book*) referring to a similar provision in the English Law:

> On the other hand, interest under this section can only be awarded in proceedings that are 'tried', but the word 'tried' in this context should not be given too narrow a construction, and proceedings may for this purpose be said to be tried" where there is a judicial decision, or where the court acts upon evidence before it, such as proceedings under Order 14 or proceedings to set aside a judgment in default or other instances in which the court judicially considers the evidence relating to the claim, and in such case the court has power to award interest under this section (see per Lord Denning MR in *Wallersteiner v Moir (No 2)* [1975] Q.B. 373, p 387 (CA)... On the other hand, where the judgment is obtained almost administratively as in default of appearance or of defence or on failure to comply with an order or the rules, without any judicial consideration, interest cannot be awarded under this section, but in such cases, the plaintiff may ask for final judgment for the principal sum claimed and for interlocutory judgment for the interest to be assessed, by analogy with an assessment of damages. See O 37, infra.

[12] Pre-trial interest is allowed by law to be claimed by the appellant. This is specified in s 11 of the Civil Law Act 1956 as well as in judicial pronouncements — see *Trans Elite Equipment Rental Sdn Bhd v PSC-Naval Dockyard Sdn Bhd* [2003] 4 MLJ 30; *Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589. The objective of this is to compensate the plaintiff for the

loss of use of the money which the defendant had kept him out of it from the time when he ought to be paid. Though the word 'tried' is used in s 11 of the Civil Law Act 1956, it is my humble opinion that this should be given a broad interpretation to include any order made by the court, be it judicially made or done administratively (as described in the *White Book*). In the case of a default judgment where a claim for such interest is made, I do not see the necessity to add to the process of entering judgment in default another requirement for assessment of this item when the defendant is already fully appraised of such claim in the statement of claim and had failed, refused or neglected to enter appearance or defence as the case may be. I do not see any injustice done to the defendant in awarding such interest without assessment since the defendant had been accorded full opportunity to contest this by entering an appearance or a defence. Obviously, by not doing so, the respondent must be deemed to have opted not to challenge any part of the claim which includes the part on pre-judgment interest. Though I agree that the process of entering such default judgment is done administratively, so to speak, considering that the process requires the court to examine relevant documents pertaining to the case before granting such order, the matter must be considered 'tried' by a court of law. There should thus be no necessity to have such pre-trial judgment interest assessed since such claim has been explicitly spelled out in the appellant's statement of claim to which the respondent was fully acquainted with. No injustice is caused by such move. It is my view that legal procedure must move with times to cater for justice to be dispensed with fairly and expeditiously. Like in this case, I do not see how the respondent could, at the material time, be prejudiced when the respondent had, despite full knowledge of the appellant's claim for this item, took no action to defend it. Why should there be another judicial process for assessment of such interest when judgment for the principal sum is allowed. Views expressed in the 1970's, which may even be repeated in the 1980's (*White Book*), may no longer be appropriate to apply to modern times when efficiency in dispensing justice is required, provided that justice is not compromised. Here, as justice is not compromised, the interpretation of s 11 of the Civil Law Act 1956 must be given a purposive interpretation to mean that as long as the court gives an order the matter is considered tried.

[13] As the said judgment in default has not been obtained by non compliance with any rules or statute or as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity (see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd*, it is not an irregular judgment and cannot be set aside *ex debito justitiae*.

A REGULAR JUDGMENT PRINCIPLE

[14] When the judgment in default is a regular judgment then the principle

in *Evans v Bartlam* would apply and it requires the applicant to show that it has some merits which the court should try. 'To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence, there is no defence and the application must fail' — per Jemuri Serjan CJ (Borneo) in *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 at p 321.

MERIT ISSUE: ACTION IS TIME BARRED

[15] On the merit of the case, the respondent raised two issues that need to be tried. The first is that the appellant's claim is statute barred. According to the respondent, the appellant's claim is for breach of contract for failing to pay the appellant's professional fees which was due on 24 March 1999. However, the appellant only filed this action on 10 October 2005. This has passed the period of six years (the last day being 24 March 2005) for such action to be brought — s 6(1)(a) of the Limitation Act 1953.

[16] To decide on this, I refer to certain pertinent correspondence between the parties.

[17] Following a demand for payment of the outstanding principal sum of RM2,147,315.70, the respondent wrote to the appellant as follows:

> We refer to the above and to your lawyer's letter (Ref TB/L/Misc-99) dated 5 April 1999 and wish to confirm and acknowledge that the overdue amount of RM2,147,315.70 claimed by you is correct for the service rendered until 23 March 1999.
>
> We do not wish to dispute this amount but seek for your consideration to withhold your legal action against us for the said amount until we resolve our restructuring exercise. As you know, we are in the process of restructuring our company and this unfortunately encounters many unexpected delays …
>
> We sincerely apologize for all the inconvenience caused to you and to your good name due to this long delay in your payment. As you are aware of our financial situation, we are unable to accommodate your request of RM20,000 per month being fees required for you to proceed with the conversion exercise. However, we would like to stress to you that if we are in a better financial position with adequate cash flow, we would certainly consider your request and provide the assistance when we are able to do so.

[18] Despite this letter, the respondent made five payments of RM10,000 each towards the account of the admitted debt, the last payment being on 9 November 1999. To cater for such situation relating to limitation period, s 26(2) of the Limitation Act 1953 provides:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

[19] Since the appellant's action was brought well within the six year period from the date of the last payment, I am of the view that this respondent's claim of limitation cannot succeed even if the matter were to go on trial. There is therefore no merit in this contention of the respondent.

MERIT ISSUE: ACCORD AND SATISFACTION

[20] The next issue raised by the respondent is that of an accord and satisfaction where the appellant had accepted the respondent's offer to settle the admitted debt for RM300,000. This claim can immediately be dismissed by looking at the correspondence between the parties. The offer to settle first came from the respondent in its letter to the appellant dated 4 March 2005 which says:

> Furtherance to our letter to you of 20 November 2003 in respect of our offer of proposed amicable settlement of RM200.000 in which you have declined, we would like to confirm herewith our revised counter offer of RM300,000 as the new amicable settlement amount …
>
> Please also be advised that the above said amount is subject to your acceptance and confirmation in writing to us shall be paid to you within 21 days of the Company completing its Extraordinary General Meeting which is currently schedule before May 2005.

[21] To this the appellant replied as follows:

> We confirm herewith our acceptance of your revised counter offer of RM300,000 as the new amicable settlement amount in respect of the above captioned.
>
> We also accept the stipulated condition that we shall be paid within 21 days at TAMRCB completing its Extraordinary General Meeting, which accordingly, is currently scheduled before May 2005.
>
> We confirm herein, subject to TAMRCB's performance of its undertakings, we withdraw any further claim in respect of the same subject matter.

[22] It is my view that by declaring the agreement is 'subject to TAMRCB's (respondent's) performance of its undertakings', the appellant did not discharge the respondent's original obligation to pay the sum of RM2,147,315.70 until the substituted obligation has been performed.

Notably, nowhere was it stated that the RM300,000 was meant to be payment in full or final settlement of the RM2,147,315.70 — see *Halsbury's Laws of England* (4th Ed), Vol 9, para 588, *Margaronis Navigation Agency Ltd v Henry W Peabody & Co of London Ltd* [1965] 1 QB 300 at p 318, *Lee Kuan Yew v Scow Khee Leng* [1986] 1 MLJ xi, *Solid Kitchen Sdn Bhd v Aman Teguh-WlCC JV Sdn Bhd & Anor* [2003] 5 MLJ 412 at p 423.

[23] As the appellant had failed to fulfill the substituted obligation to pay on the conditions as stipulated in the agreement between the parties, the appellant has every right to institute this action against the respondent. This contention of the respondent is therefore without merit.

CONCLUSION

[24] For reasons aforesaid, the appeal was allowed with costs here and below.

[25] My brothers, YA Dato' Abdull Hamid Embong JCA and YA Dato' Vincent Ng JCA have read this judgment in draft and agreed with the contents.